

INTERNATIONAL

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Editorial Informations

Publisher:

European Audiovisual Observatory 76, allée de la Robertsau
F-67000 STRASBOURG

Tél. : +33 (0) 3 90 21 60 00 Fax : +33 (0) 3 90 21 60 19

E-mail: obs@obs.coe.int www.obs.coe.int

Comments and Contributions to:

iris@obs.coe.int

Executive Director:

Susanne Nikoltchev

Editorial Board:

Maja Cappello, Editor • Francisco Javier Cabrera Blázquez,
Sophie Valais, Deputy Editors (European Audiovisual
Observatory)

Michael Botein, The Media Center at the New York Law School
(USA) • Media Division of the Directorate of Human Rights of
the Council of Europe, Strasbourg (France) • Andrei Richter,
Faculty of Journalism, Moscow State University (Russian
Federation) • Peter Matzneller, Institute of European Media
Law (EMR), Saarbrücken (Germany) • Bernhard Hofstötter,
Directorate General EAC-C-1 (Audiovisual Policy Unit) of
the European Commission, Brussels (Belgium) • Tarlach
McGonagle, Institute for Information Law (IViR) at the
University of Amsterdam (The Netherlands)

Council to the Editorial Board:

Amélie Blocman, Victoires Éditions

Documentation/Press Contact:

Alison Hindhaugh

Tel.: +33 (0)3 90 21 60 10;

E-mail: alison.hindhaugh@coe.int

Translations:

Olivier Mabilat, European Audiovisual Observatory (co-
ordination) • Erwin Rohwer • Paul Green • Elena Mihaylova
• Katherine Parsons • Marco Polo Sarl • Roland Schmid
• Nathalie Sturlès • Martine Müller-Lombard • France
Courrèges • Katharina Burger

Corrections:

Olivier Mabilat, European Audiovisual Observatory (co-
ordination) • Sophie Valais et Francisco Javier Cabrera
Blázquez • Barbara Grokenberger • Julie Mamou • Chistina
Angelopoulos

Distribution:

Markus Booms, European Audiovisual Observatory

Tel.:

+33 (0)3 90 21 60 06;

E-mail: markus.booms@coe.int

Web Design:

Coordination: Cyril Chaboisseau, European Audiovisual
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INTERNATIONAL

COUNCIL OF EUROPE

European Court of Human Rights: *Delfi AS v. Estonia* (Grand Chamber)

On 16 June 2015, the Grand Chamber of the European Court of Human Rights (ECtHR) delivered the long-awaited final judgment in the case of *Delfi AS v. Estonia*, deciding on the liability of an online news portal for the offensive comments posted by its readers below one of its online news articles. It was the first case in which the European Court has been called upon to examine, from the perspective of the right to freedom of expression, a complaint about liability for user-generated comments on an internet news portal. By a Chamber judgment of 10 October 2013, the ECtHR had first unanimously held that there had been no violation of the right to freedom of expression as guaranteed by Article 10 of the European Convention of Human Rights (see IRIS 2014-1/2). The Court confirmed the findings by the domestic courts that the Delfi news platform was to be considered a provider of content services, rather than a provider of technical services, and that therefore it should have effectively prevented clearly unlawful comments from being published. The fact that Delfi had immediately removed insulting content after having received notice of it did not suffice to exempt Delfi from liability. The reason why Delfi could not rely on the limited liability regime for internet service providers (ISPs) of Article 12 to 15 of the Directive 2001/31/EC on Electronic Commerce (no liability in case of expeditious removal after obtaining actual knowledge of illegal content and no duty of pre-monitoring) was, according to the Estonian courts, that the news portal had integrated the readers' comments into its news portal, it had some control over the incoming or posted comments and it had invited the users to post comments, while it also had an economic interest in exploiting its news platform through the integrated comment environment. The European Court did not challenge this finding by the Estonian courts, restricting its supervisory role to ascertaining whether the effects of refusing to treat Delfi as an ISP were compatible with Article 10 of the Convention. The Chamber's judgment however did not become final as, on 17 February 2014, the panel of five judges, in application of Article 43 of the Convention, decided to refer the case to the Grand Chamber of the ECtHR (see IRIS 2014-4/1).

The Grand Chamber has now confirmed the non-finding of a breach of Article 10 of the Convention, on very similar, but not identical grounds as those given in the Chamber's judgment. The Grand Chamber started by considering that the case concerns

the "duties and responsibilities" of Internet news portals, under Article 10 paragraph 2 of the Convention, when they provide for economic purposes a platform for user-generated comments on previously published content and some users - whether identified or anonymous - engage in clearly unlawful speech, which infringes the personality rights of others and amounts to hate speech and incitement to violence against them. The Grand Chamber is of the opinion that the Estonian courts' finding of liability against Delfi was a justified and proportionate restriction on the portal's freedom of expression. The Court agreed that the Information Society Services Act transposing the E-Commerce Directive into Estonian law, including the provisions on the limited liability of ISPs, did not apply to the present case, since the latter related to activities of a merely technical, automatic and passive nature, while Delfi's activities reflected those of a media publisher running an internet news portal. Delfi's involvement in making public the comments on its news articles on its news portal went beyond that of a passive, purely technical service provider. The Grand Chamber was of the opinion that the interference by the Estonian authorities in Delfi's freedom of expression was sufficiently foreseeable and sufficiently precisely prescribed by law and was justified by the legitimate aim of protecting the reputation and rights of others. While the Court acknowledged that important benefits can be derived from the Internet in the exercise of freedom of expression, it was also mindful that liability for defamatory or other types of unlawful speech must, in principle, be retained as an effective remedy for violations of personality rights.

The Court emphasised that the case concerned a large professionally managed Internet news portal run on a commercial basis, which published news articles of its own and invited its readers to comment on them. The Grand Chamber agreed with the Chamber's finding that Delfi must be considered to have exercised a substantial degree of control over the comments published on its portal. It noted that Delfi cannot be said to have wholly neglected its duty to avoid causing harm to third parties, but that the automatic word-based filter used by Delfi failed to filter out odious hate speech and speech inciting violence posted by readers and thus limited its ability to expeditiously remove the offending comments. The Court recalled that the majority of the words and expressions in question did not include sophisticated metaphors or contain hidden meanings or subtle threats: they were manifest expressions of hatred and blatant threats to the physical integrity of the insulted person. Thus, even if the automatic word-based filter may have been useful in some instances, the facts of the present case demonstrate that it was insufficient for detecting comments that can be qualified as "hate speech" and do not constitute protected speech under Article 10 of the Convention. The Court noted that, as a consequence of this failure of the filtering mechanism, such clearly unlawful comments remained online for six weeks. The Court considered that a large news portal's obligation to take effective

measures to limit the dissemination of hate speech and speech inciting violence - the issue in the present case - can by no means be equated to “private censorship”. The Grand Chamber attached weight to the consideration that the ability of a potential victim of hate speech to continuously monitor the Internet is more limited than the ability of a large commercial Internet news portal to prevent or rapidly remove such comments. By way of conclusion, the Grand Chamber took the view that the steps taken by Delfi to remove the offensive comments had been insufficient. Furthermore, the compensation of EUR 320 that Delfi had been obliged to pay for non-pecuniary damages was not to be considered as an excessive interference with the right to freedom of expression of the applicant media company. Therefore, the Grand Chamber found that the domestic courts’ imposition of liability on Delfi was based on relevant and sufficient grounds and that this measure did not constitute a disproportionate restriction on Delfi’s right to freedom of expression. By fifteen votes to two, the Grand Chamber held there has been no violation of Article 10 of the Convention.

It is important to draw attention to one of the Grand Chamber’s considerations that the Delfi case does not affect “other fora on the Internet” where third-party comments can be disseminated, for example Internet discussion fora or bulletin boards where users can freely set out their ideas on any topic without the discussion being channelled by any input from the forum’s manager. The Grand Chamber’s finding is also not applicable to a social media platform where the platform provider does not offer any content and where the content provider may be a private person running the website or a blog as a hobby. The Court indeed emphasised very strongly that the case concerned a professionally managed Internet news portal, run on a commercial basis.

The Grand Chamber also made clear that the impugned comments in the present case mainly constituted hate speech and speech that directly advocated acts of violence. Hence, the establishment of their unlawful nature did not require any linguistic or legal analysis by Delfi, since the remarks were on their face manifestly unlawful. According to the Grand Chamber its judgment is not to be understood as imposing a form of “private censorship”.

• Judgment by the Grand Chamber of the European Court of Human Rights, case of Delfi AS v. Estonia, Appl. No. 64569/09/07 of 16 June 2015

<http://merlin.obs.coe.int/redirect.php?id=17595>

EN FR

Dirk Voorhoof

Ghent University (Belgium) & Copenhagen University (Denmark) & Member of the Flemish Regulator for the Media

European Court of Human Rights: Erla Hlynsdóttir v. Iceland (no. 3)

Once again, the European Court of Human Rights (ECtHR) has rejected a finding by national courts that journalistic reporting about a criminal case had overstepped the limits of freedom of expression. The Court emphasised the role of the media in a democratic society in informing the general public of serious criminal proceedings and it referred again to the notion of “responsible journalism”. The Court found unanimously that the interference with the journalist’s rights had violated Article 10 of the European Convention on Human Rights (ECHR).

The applicant in this case was Ms. Erla Hlynsdóttir. She was a journalist, working for the newspaper DV. In 2007, the newspaper DV published an article on the ongoing criminal proceedings against Mr. A and his co-accused, Mr. B, before the Reykjavík District Court. A picture of Mr. A was published on the front page of the newspaper showing him walking into the courtroom. There was a large headline under the photograph which read “Scared cocaine smugglers” and underneath it was written that both the accused were afraid of retaliation by their accomplices and had therefore refused to identify them. Mr. A’s name also appeared on the front page. Both on the front page and in the newspaper’s article written by Erla Hlynsdóttir it was mentioned that Mr. A and his co-accused could expect prison sentences. Reference was made to the indictment by the Director of Public Prosecutions requesting a punishment of seven to eight years’ imprisonment in respect of Mr. A, for importing nearly 3.8 kilograms of cocaine, intended for sale, together with an unknown accomplice. A punishment of three to four years was requested in respect of Mr. B, who was charged in the case with removing the alleged drugs from a vehicle, in cooperation with Mr. A. After being acquitted by the Icelandic courts, Mr. A lodged defamation proceedings against Mr. SME, the editor of DV at the time, and the journalist who wrote the article, Erla Hlynsdóttir. The Supreme Court declared null and void the words “cocaine smugglers” on the front page and the statement referring to the removal of drugs in a vehicle. Both Erla Hlynsdóttir and the editor were ordered to pay approximately EUR 575 in compensation for non-pecuniary damage and about EUR 290 for the costs of publishing the judgment.

The ECtHR first reiterated that the most careful scrutiny on the part of the Court is called for when, as in the present case, the measures taken or sanctions imposed by the national authority are capable of discouraging the participation of the press in debates over matters of legitimate public concern. In the Court’s view, a journalist’s good faith should be assessed on the basis of the knowledge and information which was available to him or her at the time of

writing the item(s) in question. Thus, it is not decisive for the purpose of the present case that Mr. A was later acquitted of the charges brought against him by the Director of Public Prosecutions. Although the ECtHR fully agreed with the Icelandic Supreme Court that it is for the courts and not the media to determine whether an accused is guilty of an offence, it also recognised the right of the media to report on ongoing court cases on the basis of available and correct information, such as an indictment by the public prosecutor and information gathered at the public hearing. The Court was of the opinion that the rendering of an indictment in a media coverage after it has been read out at a trial hearing is a kind of situation where there may be special grounds for dispensing the press from its ordinary obligation to verify factual statements that are defamatory of private individuals. With regard to the labelling on the front page of the accused as “cocaine smugglers”, the ECtHR emphasised that was not the applicant journalist, but to the editor who was deemed to have defamed Mr. A thereby. The journalist cannot be found responsible and liable for this statement in the newspaper and therefore the interference with her right to freedom of expression in this manner cannot be justified. The European Court came to the conclusion that the respondent State failed to sufficiently show that Erla Hlynisdóttir acted in bad faith or otherwise inconsistently with the diligence expected of a responsible journalist reporting on a matter of public interest. Therefore, there has been a violation of Article 10 of the European Convention on Human Rights. The Court reiterated though that, in assessing the relevance and sufficiency of the national courts’ findings, the Court, in accordance with the principle of subsidiarity, must take into account the extent to which the domestic courts balanced the conflicting rights implicated in the case, in the light of the Court’s established case-law in this area. As the European Court found that the reasoning of the national courts demonstrated a lack of sufficient engagement with the general principles of the Court under Article 10 of the ECHR, it disagreed with the domestic courts’ finding that the interference with the applicant’s rights could be justified as being necessary in a democratic society. The judgment shows once again how diligent and responsible journalism reporting on issues of public interest receives a very high level of protection by the ECtHR and that in such cases, notwithstanding its references to the subsidiarity principle, the Court applies a strict scrutiny over the findings and arguments by the domestic courts.

• Judgment by the European Court of Human Rights (Second Section), case of Erla Hlynisdóttir v. Iceland (no. 3), Application no. 54145/10 of 2 June 2015
<http://merlin.obs.coe.int/redirect.php?id=17594>

EN

Dirk Voorhoof

Ghent University (Belgium) & Copenhagen University (Denmark) & Member of the Flemish Regulator for the Media

European Commission for Democracy through Law: Opinion on media legislation in Hungary

At its 103rd Plenary Session on 19-20 June 2015, the European Commission for Democracy through Law (Venice Commission) of the Council of Europe adopted its Opinion on Hungary’s media legislation, the so-called “media package”. The Commission had been asked to provide such an Opinion by the Parliamentary Assembly of the Council of Europe (PACE) in January 2015, in particular to identify provisions which pose a danger to the right to freedom of expression (see IRIS 2015-4/2).

The 27-page Opinion discusses two particular laws which form part of the “media package”, namely Act CLXXXV of 2010 on Media Services and Mass Media (see IRIS 2011-2/30), and Act CIV of 2010 on the Freedom of the Press and the Fundamental Rules on Media Content (see IRIS 2011-1/37); and also new tax laws on progressive tax on advertising revenue for media (see IRIS 2014-8/26). At the outset, the Commission notes that these “extremely lengthy” laws regulate “virtually every aspect of the media sphere”, and its Opinion only identifies “key elements” which “should be given priority for revision”.

The Commission examined a number of issues, including (a) content-based regulations, (b) sanctions for illegal media content, (c) rules on balanced news coverage, (d) protection of journalistic sources, (e) composition and power of the media regulator, (f) the public service media, (g) the so-called “National News Agency”, (h) rules on political advertising, and (i) advertisement taxes. The Opinion contains detailed discussion of these issues, and the Commission made a number of major recommendations, including: first, on content based-regulations and sanctions, the Opinion argues that certain provisions are “dangerously broad” and “should be removed”, such as the prohibitions on speech “offending religious or political beliefs”. Moreover, other provisions on speech violating “constitutional order” and hate speech “should be amended in order to ensure that the courts interpret those provisions narrowly”.

Second, on the media regulator, the Opinion states that the “rules governing election of the members of the Media Council should be changed to ensure fair representation of socially significant political and other groups and of the media community in this body. The method of appointment and the position of the Chairperson of the Media Council/the President of the Media Authority should be revisited in order to reduce concentration of powers and secure political neutrality of that figure”. Third, the Commission noted that the provision on making the National News Agency the only authorised news provider for public media was “to be repealed as from July 2015”, and rec-

ommended further amendments to “permit individual public service media to choose its own news sources, or even set up its own newsroom”. Fourth, in relation to advertisement taxes, the Commission noted that a new tax had been created on “media’s advertising revenues, with taxation levels increasing according to the volume of net turnover (i.e. overall sales figure) and with the highest rate of 50% having been set for incomes exceeding HUF 2 billion (about EUR 6,5 million)”. It also noted that the European Commission had opened an investigation on whether the tax “complies with EU state aid rules”, and that a separate application had been made to the European Court of Human Rights (ECtHR) over the tax. The Commission stated that while it did not want to “prejudge conclusions” of the European Commission and ECtHR, it was (a) “comforted by the undertaking on the part of Government to shortly change this progressive tax with a fixed rate taxation which, additionally, has a threshold so as to protect the smaller media companies from carrying the burden”, and (b) “welcomes the willingness of the Hungarian authorities to reform Act XXII and encourages them to adopt a scheme of taxation which would distribute the fiscal burden in a non-discriminatory manner and avoid excessive taxation of the media sector which is already in economic distress”.

Finally, in addition to its recommendation, the Commission also acknowledged “the efforts of the Hungarian government, over the years, to improve on the original text of the two Acts, in line with comments from various observers including the Council of Europe, and positively notes the willingness of the Hungarian authorities to continue the dialogue”.

• European Commission for Democracy through Law (Venice Commission), Opinion on Media Legislation (Act CLXXV on Media Services and the Mass Media; Act CIV on the Freedom of Press, and the legislation on taxation of advertisement revenues of mass media) of Hungary, 22 June 2015, Doc. No. CDL-AD(2015)015.

<http://merlin.obs.coe.int/redirect.php?id=17618>

EN

Ronan Ó Fathaigh

Institute for Information Law (IViR), University of Amsterdam

NATIONAL

BE-Belgium

Public Broadcaster fined for violations of product placement rules

The Flemish public broadcaster did not respect the conditions required to include product placement in

television programmes, according to the Flemish Media Regulator. These conditions are laid down in the Flemish Media Decree, which contains a specific subsection on product placement (Productplaatsing, Articles 98 to 101). According to Article 100, paragraph 1 of this decree, programmes which contain product placement must adhere to the following requirements: 1) the content of the programme must not be influenced to such an extent as to affect the editorial independence of the broadcaster, 2) the programmes must not directly incite the purchase of certain products or services, in particular through specific recommendations thereof, 3) the product or service must not be unduly prominent, and 4) viewers must be alerted to the fact that the programme contains product placement (by means of a “PP” logo at the start and end of the programme) (see IRIS 2011-1/9).

In a first decision issued in February 2015, the Regulator imposed a fine of EUR 5000 in relation to a separately broadcasted extract (Waar eet) of a popular tourism programme (Vlaanderen Vakantieland) in which Flemish celebrities talk about their favourite restaurant in Brussels. According to the Regulator, conditions 2 and 3 (above) were not respected. The restaurants and their location were explicitly named, their exterior as well as interior was shown and these images were accompanied by exclusively favourable comments. The fact that the extract of the programme was shown separately (as a “filler” between two other programmes) also played a role, as this changed its emphasis. This led to the conclusion that viewers were directly incited to visit the restaurants and that these were presented in an unduly prominent manner.

A second decision related to product placement in the public broadcaster’s daily soap opera Thuis. One of the scenes was located in a bridal shop. The shop location, as well as number of wedding dresses were put at the disposal of the broadcaster. However, according to the Flemish Regulator the brand (Dianna David) was displayed unduly prominently. The brand name was mentioned by the character which was about to get married and the salesperson in the bridal shop and the logo was clearly visible for a duration of 35 seconds and shown in the background a number of times. Notwithstanding the argument of the public broadcaster that serious efforts had been undertaken in order to integrate the brand in a reasonable manner, the Flemish Media Regulator found an infringement of Article 100, paragraph 1(3) of the Media Decree and imposed a fine of EUR 10000. The height of the fine was influenced by a similar previous violation with regard to product placement in a prime-time programme (Decision 2014-051 of 24 November 2014).

In a third decision, the Flemish Media Regulator again imposed a EUR 10000 fine with regard to the 1000th episode of a very popular cooking show (Dagelijkse Kost) shown during prime-time and attracting a large number of viewers. During the programme, in which a dish was prepared that was selected as number one

among classic Flemish dishes by the public, products and devices of different brands were visible. In order to prepare the dish, a specific brand of beer was selected and praised by the chef-presenter. The beer bottles were clearly shown a number of times. A preliminary finding focused on the fact that the PP logo was not shown before and after the programme. The public broadcaster acknowledged that this should have been the case. Secondly, the Regulator was of the opinion that the manner in which the beer was recommended, by means of spoken praise, gestures and close-ups, exceeded the limits of the extent to which viewers may be urged to use the product in question. Hence, an infringement of Article 100, paragraph 1(2) and (4) was established. Again, similar previous sanctions that were imposed on the public broadcaster were taken into account in order to determine the amount of the fine.

• *Vlaamse Regulator voor de Media (algemene kamer), Beslissing nr. 2015/016, zaak van VRM tegen NV Vlaamse Radio- en Televisieomroeporganisatie, (dossier nr. 2015/177), 23 februari 2015* (Decision 2015-016, 23 February 2015)

<http://merlin.obs.coe.int/redirect.php?id=17596>

NL

• *Vlaamse Regulator voor de Media (algemene kamer), Beslissing nr. 2015/024, zaak van VRM tegen NV Vlaamse Radio- en Televisieomroeporganisatie, (dossier nr. 2015/180), 9 maart 2015* (Decision 2015-024, 9 March 2015)

<http://merlin.obs.coe.int/redirect.php?id=17597>

NL

• *Vlaamse Regulator voor de Media (algemene kamer), Beslissing nr. 2015/032, zaak van VRM tegen NV Vlaamse Radio- en Televisieomroeporganisatie, (dossier nr. 2015/186), 27 april 2015* (Decision 2015-032, 27 April 2015)

<http://merlin.obs.coe.int/redirect.php?id=17598>

NL

Eva Lievens

KU Leuven & Ghent University

CH-Switzerland

Close referendum result on universal broadcasting charge

The Swiss people adopted an amendment of the Radio- und Fernsehgesetz (Radio and Television Act - RTVG) with a wafer-thin majority in a referendum held on 14 June 2015. Changes to the financing of public service broadcasting, which the Swiss Parliament had approved in September 2014 (see IRIS 2014-10/6) were supported by 50.08% of the voters. The referendum was preceded by intensive political campaigning that attracted a high level of media coverage.

Voter turnout for the referendum was a mediocre 42.8%. According to the provisional official result announced on polling day, supporters of the proposed amendment outnumbered their opponents by an extraordinarily narrow margin of 3,696 votes (1,128,369 for, 1,124,673 against). In view of the close outcome, a recount may be demanded and ordered.

The referendum was held because the Schweizerische Gewerbeverband (Swiss Trades Association) had collected the 50,000 signatures required. The main theme of the RTVG amendment is the replacement of the current device-based charge with a universal broadcasting charge which households and businesses will, in future, have to pay even if they do not own a reception device. The Federal Council (Bundesrat) had proposed the change in response to technological advances, since radio and television programmes were increasingly being watched on mobile phones, tablets and computers: 92% of Swiss households and practically all businesses have Internet access.

The Swiss Trades Association particularly opposed the idea that households without reception devices and all companies with an annual turnover of at least CHF 500,000 would have to pay the charge. It criticised the universal charge as a new tax, for which there was no constitutional justification.

The purpose of the charge is unchanged, i.e. to finance the Swiss broadcasting corporation SRG (which receives the largest share of the CHF 1.3 billion generated by the charge each year), as well as the 21 local radio and 13 local television stations with a public service remit. Their annual share would increase from around CHF 54 million to around CHF 80 million. The proposal's opponents argued that the new payment system was being voted on before a fundamental debate on the future of public service broadcasting and of SRG's remit had been held. SRG therefore found itself at the centre of a heated political campaign.

The referendum result showed significant differences between the various parts of Switzerland. Most of German-speaking Switzerland opposed the proposal (except for Basel City and the trilingual canton of Grisons), whereas the French-speaking cantons (Vaud, Geneva, Neuchâtel and Jura and the bilingual Fribourg canton) were generally in favour, as were Swiss expatriates.

However, the rejection of the universal charge in the Italian-speaking canton of Ticino (52% opposed) was a surprise, since the canton will benefit hugely from the redistribution of the funds generated, contributing around 5% of the total revenue, but receiving around 20% of the money collected. The SRG-owned Radiotelevisione Svizzera di Lingua Italiana (RSI) operates two television and three radio stations, which many opponents of the RTVG amendment consider excessive.

This was the first Swiss referendum concerning broadcasting legislation. Although referendums on new legislative provisions are common in Switzerland, they have never previously had anything to do with audiovisual media. However, a referendum was held concerning a broadcasting-related provision of the Constitution, which was adopted at the third attempt in 1984.

• *Vorläufiges amtliches Abstimmungsergebnis und Erläuterungen des Bundesrates zur Abstimmungsvorlage* (Provisional official referendum result and Bundesrat's explanation of the referendum proposal)
<http://merlin.obs.coe.int/redirect.php?id=17633>

DE FR

Franz Zeller

*Federal Communications Office / Universities of Bern,
Basel & St. Gallen*

DE-Germany

Supreme Court rules on admissibility of Tagesschau app

On 30 April 2015, the Bundesgerichtshof (Federal Supreme Court - BGH) ruled that the Tagesschau app may be unlawful if, when viewed as a whole, it is categorised as a press-like service (case no. I ZR 13/14). The case has now been referred back to the Oberlandesgericht Köln (Cologne Appeal Court - OLG Köln), which will decide whether the app breaches the ban on press-like services that are not related to a specific programme, enshrined in Article 11d(2)(1)(3) of the Rundfunkstaatsvertrag (Inter-State Broadcasting Agreement - RStV).

Since the end of 2010, ARD and NDR have provided the Tagesschau app, which offers mobile access to the tagesschau.de portal containing audio files, images, text and video content. Newspaper publishers applied for injunctions against both ARD and NDR with regard to the app's content on 15 June 2011, which, they argued, breached competition law. In their opinion, the app infringed Article 11d(2)(1)(3) RStV, which should be treated as a rule on market behaviour in the sense of Article 4(11) of the Gesetz gegen den unlauteren Wettbewerb (Unfair Competition Act - UWG). Under this provision, press-like telemedia services that are not related to a specific programme are prohibited.

On 20 December 2013, the OLG Köln had, as the appeal court, ruled that the service, under the name 'tagesschau.de', had not been considered press-like under the three-step test and had been approved by the Staatskanzlei Niedersachsen (Lower Saxony State Chancellery). The competition authorities had to abide by this court ruling (6 U 188/12). Any breach by the defendants of Article 11d(2)(1)(3) RStV could therefore not justify a claim under competition law.

The BGH has now decided that the OLG Köln was right to refuse the action for an injunction against ARD because ARD was an association of broadcasting authorities with no legal standing of its own and the action was therefore inadmissible. However, as regards the claim against NDR, the BGH upheld the appeal against the OLG Köln's decision. It ruled that the press-like nature of the app on 15 June 2011 could be verified

by the courts. The approval of the concept of the "tagesschau.de" portal was not binding on the competition authorities. It only concerned the basic concept rather than how it was actually implemented in a particular case. The ban on press-like services not related to a specific programme, enshrined in the RStV, constituted a rule on market behaviour under Article 4(11) UWG, which was also designed to protect newspaper publishers by limiting the Internet-based activities of public service broadcasters. An infringement of this rule could certainly give rise to a claim under competition law for the publishers.

The BGH therefore referred the matter back to the OLG Köln, which must now decide whether the Tagesschau app, in its concrete form of 15 June 2011, should be considered press-like. The BGH explained that the determining factor here was not the individual content, but the press-like nature of the service accessible via the app under "tagesschau.de", taking into account all content not related to specific programmes that had been available on the date concerned. One particular indication of its press-like nature, for example, might be the fact that it mainly comprised written text.

• *Pressemitteilung des BGH (Urteil vom 30. April 2015 - I ZR 13/14 - Tagesschau-App)* (Press release of the Federal Supreme Court (Judgment of 30 April 2015 - I ZR 13/14 - Tagesschau-App))

<http://merlin.obs.coe.int/redirect.php?id=17619>

DE

Tobias Raab

*Institute of European Media Law (EMR), Saarbrücken/
Brussels*

Kassel Administrative Court declares supervisory measure against "Big Brother" programme unlawful

In a ruling of 7 May 2015 - 8 A 254/14 - the Verwaltungsgerichtshof Kassel (Kassel Administrative Court) decided that the supervisory measure imposed by the Hessische Landesanstalt für privaten Rundfunk und neue Medien (Hessian Private Broadcasting and New Media Office - LPR Hessen) against the broadcast of an episode of the "Big Brother" programme was unlawful.

The LPR Hessen had classified a "Big Brother" daily highlights show as harmful for the development of children and young people and therefore ordered the broadcaster RTL 2 not to broadcast future episodes of the programme between 7pm and 8pm.

RTL 2 appealed against the media authority's decision.

The VGH Kassel found that the "Big Brother" format was characterised by its coverage of current events and could not therefore be presented for assessment prior to transmission. Under Article 20(3)(2)

of the Jugendmedienschutz-Staatsvertrag (Inter-State Agreement on the Protection of Young People in the Media - JMStV), when a programme could not be presented for assessment prior to transmission, the Land media authority should refer the matter to a certified organisation of voluntary self-regulation for a decision.

According to the court, this meant that the Land media authority could not intervene by imposing a supervisory measure itself.

The VGH Kassel therefore quashed the Hessian authority's decision, including all supervisory measures, and upheld the appeal.

• *Pressemitteilung des VGH Kassel, 7. May 2015* (VGH Kassel press release, 7 May 2015)

<http://merlin.obs.coe.int/redirect.php?id=17630>

DE

Cristina Bachmeier

*Institute of European Media Law (EMR), Saarbrücken/
Brussels*

Hamburg Administrative Court refuses claim to free distribution of "must-carry" programmes

According to media reports, the Verwaltungsgericht Hamburg (Hamburg Administrative Court - VG Hamburg) decided on 29 April 2015, in case no. 17 K 1672/13, that the "must-carry" obligation of cable network operators under Articles 50 et seq. of the Rundfunkstaatsvertrag (Inter-State Broadcasting Agreement) does not mean that programmes must be carried free of charge. It therefore granted an auxiliary request brought by the cable network operators.

The dispute concerns the cost of carrying public service channels via the cable networks. Under the so-called "must-carry" rules laid down by the relevant Land media authorities, the network operators are obliged to distribute channels financed through the licence fee and so-called "third channels". The public service broadcasters cancelled their agreements with the cable network operators in 2012, arguing that, since they concerned "must-carry" programmes that the network operators were obliged to distribute, the programmes should be carried free of charge.

The cable network operators believe that the legal obligation to distribute "must-carry" programmes does not mean that they should be carried free of charge. In their main claim, which was rejected by the court, they argued that the broadcasters should be obliged to sign a distribution agreement. In an auxiliary request, they claimed that the broadcasters should, in any case, be required to pay to have their programmes distributed.

In the case at hand, the VG Hamburg considered that the broadcasters were obliged to pay cable network operators for distributing their programmes, even though a distribution agreement was unnecessary.

An appeal may be lodged with the administrative court of appeal.

• *Urteil des VG Hamburg vom 29. April 2015 - Az.: 17 K 1672/13* (Judgment of the VG Hamburg of 29 April 2015 - case no.: 17 K 1672/13)

<http://merlin.obs.coe.int/redirect.php?id=17620>

DE

Katrin Welker

*Institute of European Media Law (EMR), Saarbrücken/
Brussels*

ES-Spain

Spanish broadcasting authority finds advertising rules were breached

In two decisions of 9 April 2015, the Spanish Comisión Nacional de los Mercados y la Competencia (National Commission for Markets and Competition - CNMC) imposed sanctions against Spanish media service providers for breaches of advertising regulations.

The CNMC found that both Atresmedia (SNC/DTSA/1753/14/ATRESMEDIA) and Mediaset (SNC/DTSA/1748/14/MEDIASET) had harmed the integrity of programmes through the way they had interrupted them with advertising. Programmes of various genres had repeatedly been interrupted in the middle of scenes and conversations, sometimes even in the middle of sentences and words.

The broadcasters referred to a particular form of advertising ('pauta única', meaning 'common pattern'), in which the same advertising spot was broadcast simultaneously on several channels within the same broadcasting group. The time at which the spot was shown was based on the programme schedule of the channel with the largest audience. It was not always possible to take into account what was being shown on smaller channels at the same time.

The CNMC rejected this argument. Broadcasters were free to introduce new forms of advertising as long as they were admissible under the law. However, the practical problems they caused should not be passed on to the viewers. Both media service providers were therefore fined EUR 150,000.

In another decision of 16 April 2015 (SNC/DTSA/1634/14/MEDIASET), the CNMC sanctioned Mediaset for exceeding the maximum duration of advertising. The case essentially concerned self-advertising on TV channels Telecinco, Cuatro and

FDF, which is limited to five minutes per hour under the Spanish Act on Audiovisual Communication (Ley 7/2010 General de la Comunicación Audiovisual). According to the CNMC, however, the TV broadcasters' definition of "own programmes" had been too broad and the spots had therefore been allocated to the wrong category. Instead, they should have been treated as normal advertising. On these grounds, the CNMC ruled that six infringements had been committed over several days in June 2014 and imposed a fine of EUR 49,263.

• *Resolución del procedimiento sancionador, incoado a Atresmedia Corporación de Medios de Comunicación, S. A., por la vulneración de lo dispuesto en el artículo 14.4, primer párrafo, de la ley 7/2010, de 31 de marzo, general de comunicación audiovisual (SNC/DTSA/1753/14/Atresmedia)* (CNMC decision of 9 April 2015, SNC/DTSA/1753/14/Atresmedia)

<http://merlin.obs.coe.int/redirect.php?id=17621>

ES

• *Resolución del procedimiento sancionador incoado a Mediaset España Comunicación, S. A., por la vulneración de lo dispuesto en el artículo 14.4, primer párrafo, de la ley 7/2010, de 31 de marzo, general de comunicación audiovisual (SNC/DTSA/1748/14/MEDIASET)* (CNMC decision of 9 April 2015, SNC/DTSA/1748/14/MEDIAS)

<http://merlin.obs.coe.int/redirect.php?id=17622>

ES

• *Resolución del procedimiento sancionador, incoado a Mediaset España Comunicación, S. A., por vulneración de lo dispuesto en el artículo 14.1 de la ley 7/2010, de 31 de marzo, general de comunicación audiovisual (SNC/DTSA/1634/14/MEDIASET)* (CNMC decision of 16 April 2015, SNC/DTSA/1634/14/MEDIASET)

<http://merlin.obs.coe.int/redirect.php?id=17623>

ES

Peter Matzneller

*Institute of European Media Law (EMR), Saarbrücken/
Brussels*

Changes in the sale of audiovisual rights to transmit football

The Spanish government approved on 1 May a Royal Decree governing the commercialisation of audiovisual rights over broadcast football matches, as well as the distribution of the income generated. Already passed as law by Parliament, it will come into effect in 2016.

One of the main sources of income for the clubs that participate in the First and Second Division of the Spanish Football League is the sale of TV rights to the Football League (Campeonato Nacional de Liga de Primera y Segunda División), known as "La Liga", and the National Cup (Supercopa de España). The Professional Football League (Liga Nacional de Fútbol Profesional - LPF) managed these audiovisual rights until the 1997/1998 season, when each club began to negotiate their own rights (see IRIS 2013-5/21). This led to very different earnings between top and small clubs and to many legal battles among those who hold the rights, broadcasters and football clubs (see IRIS 2007-10/16 and IRIS 2011-10/13).

The new legislation reorganises the current football audiovisual rights market, establishing with a high

level of detail that: (a) the rights to transmit games will be pooled and sold collectively again. The LPF will manage those rights related to "La Liga" and the Royal Spanish Football Federation (Real Federación Española de Fútbol - RFEF) those of the National Cup and the King's Cup (Copa de S. M. el Rey); (b) the distribution of the income generated will be shared among clubs following criteria such as performance and size. Of total revenue, 90% will go to first division clubs and the remaining 10% to second division clubs; and (c) once compensated, each club must contribute mandatorily to a Compensation Fund to support policies formulated by the LPF, RFEF and the National Sports Council.

The National Commission for Markets and Competition (Comisión Nacional de los Mercados y la Competencia - CNMC) will have the leading role in supervising agreements.

• *Real Decreto-ley 5/2015, de 30 de abril, de medidas urgentes en relación con la comercialización de los derechos de explotación de contenidos audiovisuales de las competiciones de fútbol profesional* (Royal Decree-Law 5/2015 of 30 April on urgent measures in relation to the commercialisation of audiovisual rights of professional football competitions)

<http://merlin.obs.coe.int/redirect.php?id=17599>

ES

Trinidad García Leiva

Universidad Carlos III, Madrid

FI-Finland

Amended provisions on online injunctions in the Copyright Act

Provisions of the Finnish Copyright Act (404/1961) on injunctions for the online environment have been reformulated and new provisions on preventive injunctions were introduced. This revision was deemed necessary due to some defects detected in the case law. Moreover, the new provisions are aimed at governing situations where the alleged infringer remains unknown or is situated abroad. The amending Act entered into force on 1 June 2015.

The provisions, tailored for an effective enforcement of copyright in the online environment, were introduced to Sections 60(a) to 60(c) of the Copyright Act, which cover access to data, actions for cessation and cease orders respectively. Moreover, a general provision on prohibition against an infringer is found in Section 56(g). Minor reformulations of the former Sections include updated and renewed references to the Information Society Code, which entered into force on 1 January 2015, as well as to Chapter 7 of the Code of Judicial Procedure (4/1734) on precautionary measures. In addition, the content of the provisions was

clarified and amended. Section 60(c) on cease orders accompanying actions for cessation was reformulated with regard to the necessary conditions, the hearing of parties, the possibility of an interim injunction and the revocation of the order. Moreover, provisions on cease orders prior to an action were removed from Section 60(c) and repositioned in a new Section 60(d) on interim cease orders. In case of an interim order, an action (Section 60(b)) or an application pursuant to Section 60(e) must be filed within two months (paragraph 60(d)(3-4)). New provisions on interim cease orders for situations where the alleged infringer remains unknown were also introduced (paragraph 60(d)(2)). However, according to the preliminary works, the threshold is to be higher than that of Section 60(c).

The new Section 60(e) introduces the possibility of ordering a preventive injunction against the intermediary if no action for cessation can be filed because the alleged infringer remains unknown. Previously, it was always mandatory to eventually sue the alleged infringer. The new injunction requires that either vast amounts of copyrighted works are made available to the public unauthorised or a serious threat to the rights of the author exists (paragraph 60(e)(1)). The order cannot be unreasonable, taking into account all relevant circumstances and third parties and the intermediary must be heard (paragraph 60(e)(3)). The term is fixed to a maximum of one year at a time. However, it can be extended (paragraph 60(e)(4)). According to the preparatory works, the preventive injunction would be applicable only in the most serious cases.

Section 60(f) builds on the previous Section 60(c)(5), as it includes provisions on compensating costs and damages. Costs of enforcing cease orders are primarily born by the intermediary. However, if the action for cessation is not successful, the applicant must compensate the costs and damages incurred by the intermediary and the alleged infringer (paragraph 60(f)(1)). The intermediary must also bear the costs of interim and preventive injunctions pursuant to paragraphs 60(d) and 60(e) (paragraph 60(f)(2)). The provider may decide on the technical execution of the injunctions and it may have the costs covered afterwards, as noted in the preparatory works. According to Section 60(f)(3), the final allocation of costs may be decided in the proceedings concerning the action for cessation. Section 60(g) replaces the previous Section 60(d), noting that paragraphs 60(a) to 60(f) are applicable to right-holders pursuant to Chapter 5 on related rights.

Originally, provisions on slowing down traffic were also planned, but they were not included in the Government bill mainly due to providers' views on the matter, as well as uncertainties related to the technical execution and the effects of such measures.

• *Hallituksen esitys eduskunnalle laiksi tekijänoikeuslain muuttamisesta (HE 181/2014 vp)* (Government bill on Act amending the Copyright Act)

<http://merlin.obs.coe.int/redirect.php?id=17629>

FI

• *Laki tekijänoikeuslain muuttamisesta (607/2015)* (Act amending the Copyright Act, Code of Judicial Procedure (4/1734))
<http://merlin.obs.coe.int/redirect.php?id=17600>

EN

Anette Alén-Savikko

*Institute of International Economic Law (KATTI),
University of Helsinki*

Amendments to the Copyright Act with regard to network recording services

The Finnish Government bill (HE 181/2014 vp) proposed, among others, new provisions for network recording (PVR) services in the Finnish Copyright Act (404/1961) (see IRIS 2015-2/15). In March 2015, the proposal was accepted by Parliament with some amendments. Later, the Act amending the Copyright Act (607/2015) introduced a new Section 25 I to the Finnish Copyright Act. During the legislative process, the Education and Culture Committee proposed minor amendments to the formulation of the provisions and required a right of refusal to be included in the Section. The amending Act entered into force on 1 June 2015.

Section 25 I (1) states that the provider of a network recording service may make a copy of a work included in a programme transmitted on television by virtue of an extended collective licence pursuant to Section 26. This copy may be used for making available to the public in such a way as to enable the programme to be viewed and listened to by customers of the recording service provider, from a place and at a time chosen by them. Paragraph 1 does not apply to a work the author of which has assigned to the broadcasting company the right to decide on the use of the work pursuant to paragraph 1 (paragraph 25 I (2)).

Paragraph 3 includes another restriction on the applicability of paragraph 1, if the producer has acquired the rights of relevant authors to decide on the use of works included in the programme pursuant to paragraph 1 and the producer has refused the use of the programme. Originally, no right of refusal for individual non-represented authors was proposed, since licensing could have been rendered impossible. The Education and Culture Committee agreed, but deemed it necessary anyway. Otherwise, authors could actively seek to challenge network recording services. The right was channelled to be exercised via the producer.

In addition, references to Section 25 I were included in the provisions on related rights, excluding the protection of transmission signals in Section 48 of the Copyright Act. According to the Government bill, contracting is required both with the broadcasters and the organisation(s) representing right-holders. The former grant permissions regarding own and acquired

rights, as well as negotiating on the practical execution, while the latter grant permissions with regard to rights that have not been transferred to broadcasters. By force of law, the effects are extended to right-holders not represented by the organisation(s) (see paragraph 26). All programming is, in principle, covered by the provision, but contracting may lead to different solutions. The starting point is streaming for private customers, while offline viewing could also be agreed upon.

Section 26 on extended collective licenses was also modified. Paragraph 1 was reformulated so as to clarify the legal basis of the extensive effects. The organisation approved by the Ministry of Education and Culture, which represents, in a given field, authors of works used in Finland, is deemed representative also of authors of other works in the same field with regard to the contract in question. All works in a given field could be used as prescribed by the licence (paragraph 26(1)). The language used in Section 26 was also updated and the terminology now corresponds to that used by the EU.

Other amendments included a new title for each Section of the Copyright Act.

• *Hallituksen esitys eduskunnalle laiksi tekijänoikeuslain muuttamisesta (HE 181/2014 vp)* (Government bill on Act amending the Copyright Act)

<http://merlin.obs.coe.int/redirect.php?id=17629>

FI

Anette Alén-Savikko

*Institute of International Economic Law (KATTI),
University of Helsinki*

Reintroduction of remuneration for “must-carry” retransmission

The remuneration for retransmission of programmes subject to a “must-carry” obligation was reintroduced to the Finnish Copyright Act (404/1961). The amendments to Sections 25(i) and 47 of the Copyright Act entered into force on 1 June 2015. Previously, Section 25(i) of the Copyright Act required no separate authorisation and right-holders were not entitled to remuneration for retransmitted works. Reference was made to Section 134 of the Communications Market Act, which included the “must-carry” obligation. However, this obligation is currently found in Section 227 of the Information Society Code (917/2014), which entered into force on 1 January 2015. Similar arrangements covered Section 47 of the Copyright Act on the use of sound phonograms.

The new Section 25(i)(1) basically corresponds to the previous paragraph 1, with an updated reference: it provides a company offering a network service via cable network, which is used primarily for the transmission of television and radio programming and by

a significant number of end users as their principal means of receiving radio and television transmission, the possibility of retransmission. The company may retransmit by wire for reception by the public a work included in a transmission referred to in Section 227 of the Information Society Code without any change and simultaneously with the original transmission.

The new second paragraph includes the author’s right to remuneration from the retransmitting company if the latter does not show that the remuneration has been paid when acquiring the transmission rights in question. If remuneration for the retransmission was not paid to right-holders directly by the transmitting organisation, it can only be paid via an organisation which represents authors of works used in Finland (paragraph 26(1)). The remuneration right persists for three years. These changes also cover Sections 45 (performer), 49 (database) and 49(a) (photographer) of the Copyright Act, since these include a reference to Section 25(i). Regarding Section 48 (transmission signal), the reference was limited to Section 25 I (1) (unless the transmission originates from another EEA state). In addition, Section 47 on sound phonograms and music videos was amended in order to reintroduce a remuneration right whereby producers and performers of recorded performances have the right to remuneration for retransmission. For remunerating retransmission pursuant to paragraph 25(i)(1), the retransmitting organisation is responsible if it does not show that a payment has already been made (paragraph 47(2)).

In Finland, the provision on the obligation to remunerate authors was abolished in 2005 by Act 821/2005, which took effect on 1 January 2006. The obligation to pay remuneration where there was a legal obligation to carry the content was deemed disproportionate from the point of view of the operator’s fundamental protection of property. The compatibility of the Finnish provisions with EU law was, however, ultimately questioned. During the subsequent legislative process, the Finnish Constitutional Law Committee reassessed the situation in light of previous legislative amendments which had narrowed down the scope of “must-carry”. It also took into account freedom of speech and pluralism, as well as the property right interests of authors. Remuneration was not found problematic. However, a clearer formulation of the provisions with a view to preventing double remuneration was deemed necessary.

• *Hallituksen esitys eduskunnalle laiksi tekijänoikeuslain 25 i ja 47 §:n muuttamisesta (HE 305/2014 vp)* (Government bill on amending Sections 25 I and 47 of the Copyright Act)

<http://merlin.obs.coe.int/redirect.php?id=17631>

FI

Anette Alén-Savikko

*Institute of International Economic Law (KATTI),
University of Helsinki*

New provisions on reasonable contract terms in copyright assignments

New provisions on the adjustment of contract terms on transfer of copyright by the original author were included in Section 29 of the Finnish Copyright Act (404/1961). Previously, Section 29 only referred to the general provisions of the Contracts Act (228/1929), Section 36 of which provides for adjusting or setting aside contract terms which are unfair or the application of which would lead to an unfair result. A “lex specialis” has been included in the Employment Contracts Act (55/2001), among others. The new provision entered into force on 1 June 2015.

According to the new Section 29(1), a term in a contract on transfer of copyright concluded by the original author may be adjusted or set aside if it is unreasonable in a way that contradicts established contractual practice in the field or in some other way, or if its application would result in an unreasonable outcome. The assessment must take into account the entire content of the contract, positions of the parties, underlying and subsequent circumstances, as well as other factors (paragraph 29(2)). If a term, pursuant to paragraph 1, is such that the rest of the contract cannot be fairly enforced without alterations, the contract may be adjusted in other regards or declared terminated (paragraph 29(3)). Section 29(4) notes that an agreement on the amount of remuneration for the assignment is also deemed a contract term. However, terms relating to an assignment of copyright via an employment contract may be adjusted pursuant to Section 2 of Chapter 10 of the Employment Contracts Act (paragraph 29(5)). In other cases, the general provision in the Contracts Act applies (paragraph 29(6)).

The legal framework on creative works has undergone profound changes in recent years and authors may not have much negotiating power when assigning their copyright. The reform thus aims for preventive effects and increased fairness in negotiating copyright assignments with the original author. The new provisions do not cover the subsequent transfer of rights. The scope of the provisions is further restricted by the fact that fairness of contract terms in employment relations would still be governed by the provisions of the Employment Contracts Act. The solution was deemed as a compromise between more detailed legislation and settling for a blank reference provision. The new provisions largely follow the wording of the general provision on adjusting contract terms and have a narrow scope of application. In the preparatory works, the proposed provision was not deemed able to change the legal state and its expected practical effects were left somewhat open. Notably, authors often do not have the courage or the financial means to initiate legal proceedings, while already the previous provisions aimed at preventive effects. The impossibility of making wider changes including, for instance,

procedural or contract law provisions to enable collective action was also noted in the preparatory works.

• *Hallituksen esitys eduskunnalle laiksi tekijänoikeuslain muuttamisesta (HE 181/2014 vp)* (Government bill on Act amending the Copyright Act)

<http://merlin.obs.coe.int/redirect.php?id=17629>

FI

Anette Alén-Savikko

*Institute of International Economic Law (KATTI),
University of Helsinki*

FR-France

Conseil d'État cancels CSA decision refusing DTTV channels' switch to freeview

Two decisions handed down on 17 June 2015 by the Conseil d'État have cancelled the decisions made last July by the Conseil Supérieur de l'Audiovisuel (audiovisual regulatory authority - CSA) which refused the DTTV channels LCI and Paris Première authorisation to switch to freeview.

Article 42-3 of the Act of 30 September 1986, as amended by the Act of 15 November 2013, enables the audiovisual regulatory authority to authorise a switch from pay TV to freeview (or vice versa) by waiving the standard procedure which provides for allocating a freeview DTTV frequency after first calling for applicants (the “open procedure”). The approval required from the CSA is conditional on the channels observing pluralism, taking balance in the advertising market into account, and promoting the quality and diversity of programmes. On 29 July 2014, at the end of a thorough investigation process, the CSA refused to grant LCI and Paris Première the approvals they were requesting in order to switch from pay DTTV to freeview DTTV (see IRIS 2014-8/22). The two channels appealed to the Conseil d'État, claiming the CSA had exceeded its authority and calling for the CSA's decisions to be cancelled. Almost one year later, the Conseil d'État has upheld their claim, finding that the procedure followed by the CSA was irregular.

It was claimed, inter alia, that the procedure was contrary to the “Authorisations Directive” (Directive 2002/20/EC of 7 March 2002) and the “Competition Directive” (Directive 2002/77/EC of 16 September 2002). The Conseil d'État found that, although the specific approval procedure for pay DTTV operators wishing to switch to freeview was not in breach of European Union law, the CSA ought to consider in each individual case whether or not there was any justification for using such a procedure, which was only meant to be used if this was in the general interest.

Examining the legality of the contested decisions made by the CSA, the Conseil d'État went on to re-

call that Article 42-3 requires the CSA to carry out an impact study before reaching a decision; the study must be made public. "In order to ensure the transparency of the procedure followed, it is the legislator's intention that the impact study should be made public before the date on which the application is deliberated on". In the absence of any regulatory provision defining the procedure applicable, the Conseil d'État held that the CSA must render the study public "in good time, so that the applicant and the other parties involved are able to make written observations or ask to be heard on the conclusions of the study". In the case at issue, however, the study carried out on the impact of the applications for approval submitted by LCI and Paris Première to switch from pay DTTV to freeview DTTV was not made public until the day on which the CSA published its decision. The decision was therefore cancelled.

The CSA took note of this interpretation, which makes no reference to the economic analysis behind the decisions to refuse the applications. It will therefore have to decide again on the applications from the channels within six months, taking the findings of the Conseil d'État into account. The decisions do not affect the outcome of the new examination by the CSA, which will take account of equilibrium in the advertising market in its deliberations. The CSA will also have to adapt its processing of all pending and future procedures to include an impact study, to ensure that the law is observed.

• *Conseil d'Etat (5e sect.), 17 juin 2015, LCI et Paris Première (2 espèces)* (Conseil d'État (5th section), 17 June 2015, LCI and Paris Première (two separate cases))

<http://merlin.obs.coe.int/redirect.php?id=17624>

FR

Amélie Blocman
Légipresse

Withdrawal of operating licence for film carrying only a ban on showing to under-16s

In a decision on 1 June 2015, the Conseil d'État upheld an application from an association contesting the screening visa (visa d'exploitation) issued by the Minister for Culture for the horror film "Saw 3D: The Final Chapter", which carried a ban on showing to anyone under the age of 16, whereas the association felt it should not be shown to anyone under the age of 18.

In the case at issue, the Minister for Culture had issued the disputed visa to the film in 2010, and required audiences to be warned in the following terms: "This film includes many particularly realistic, brutal and even savage scenes of torture". The applicant association, believing that the film should have been banned for anyone under the age of 18, was calling for the screening visa to be withdrawn. The administrative court refused the application, as did the administrative court of appeal. The association therefore

referred the matter to the Conseil d'État. The decision states the principle according to which "it is for the judges deliberating on the merits of the case, to whom an appeal has been made against the screening visa issued for a work which includes scenes of violence, to consider whether the scenes at issue are or are not characteristic of the existence of scenes of extreme violence as referred to in paragraphs 4 and 5 of Article R. 211-12 of the Cinema and Animated Image Code which require a ban on their being shown to minors". If the court accepts the qualification, it must then consider the way in which the scenes were shot and how they fit into the work in question in order to determine whether the film, in addition to being banned for showing to anyone under 18, should be "X-rated", i.e. placed on the list provided for in Article L. 311-2 of the Cinema Code.

In the case at issue, the administrative court noted that the film includes many scenes that had been shot extremely realistically, repeatedly showing acts of torture and barbarism, and representing in a particularly indulgent fashion the atrocious sufferings, both physical and psychological, of the victims caught in the traps elaborated by a killer, in which they were encouraged to mutilate themselves either to escape death or to save their family and friends. The court found that such scenes, although not characteristic of incitement to violence, represented violence in such a way as to be potentially damaging to minors and therefore justified a ban on showing the film to anyone under the age of 18. It found that the Minister for Culture had committed an error of appreciation by only banning the showing of the film to anyone under the age of 16. The Conseil d'État therefore cancelled the Minister's decision, and she will now have to re-examine the dossier and issue a new - more restrictive - screening visa.

• *Conseil d'Etat (10e et 9e sous-sect. réunies), 1er juin 2015 - Association Promouvoir* (Conseil d'État (9th and 10th sub-sections combined), 1 June 2015 - the association "Promouvoir")

<http://merlin.obs.coe.int/redirect.php?id=17625>

FR

Amélie Blocman
Légipresse

GB-United Kingdom

Channel 4 News breaches Ofcom's accuracy rules by showing misleading archive footage during news report

Ofcom determined that the Channel 4 News report on Russia's foreign and military policy in Eastern and Western Europe following President Putin's early exit from the G20 summit in Brisbane Australia contravened rule 5.1 of the code of conduct which states

that “News, in whatever form, must be reported with due accuracy and presented with due impartiality”.

Pursuant to the Communications Act 2003, Ofcom has a statutory duty to set standards for broadcast content, including that TV and radio news services are reported with due accuracy and presented with due impartiality. However, when implementing the requirement of accurate and impartial news reports, Ofcom has to balance that against a broadcaster’s and its audience’s right to freedom of expression pursuant to Article 10 of the European Convention on Human Rights.

Channel 4 News is produced by Independent Television News (ITN) for Channel 4, a terrestrial public service TV station in the UK. On 17 November 2014, Channel 4 news broadcast a report about 5 minutes in length presented by their foreign correspondent, Cathy Newman. Behind Cathy Newman appeared an image of President Putin with the title “Russia roars”.

The introductory lines of the news report stated the following: “Rebuked by world leaders, Russia’s leader Vladimir Putin made an early exit from the G20 summit in Australia this weekend, warned by President Obama, ‘you don’t invade other countries and finance proxies’. The impact of Russia’s aggression in Ukraine and elsewhere has been felt across Eastern Europe - not least in Prague 25 years after it broke free from the former Soviet bloc”.

The first 3 minutes of the report focused on Eastern Europe, including footage of protesters in Prague holding up red cards in protest against the President of the Czech Republic, Milos Zeman, for allegedly allowing Prague “to drift close to President Putin” on the 25th anniversary of the so-called Velvet Revolution, when in 1989 there was a non-violent transition from Communist rule in Czechoslovakia to a parliamentary republic.

The report proceeded to focus on the UK with the correspondent saying: “NATO says its aircraft have intercepted more than 100 Russian military planes over Northern Europe this year, three times as many as last year, and back to Cold War levels this year. They included several incursions into British air space”.

At this point there was an audio clip of a Royal Air Force (RAF) pilot warning an aircraft in British airspace saying: “I’m instructed by Her Majesty’s Government of the United Kingdom to warn you that if you do not respond immediately to my order you will be shot down”. The plane depicted was a Latvian aircraft being intercepted by the RAF, but the Channel 4 report gave the impression it was a Russian piloted aircraft.

In response to the Ofcom complaint, Channel 4 News responded by saying that they apologised for the mistake. The 8-second clip formed only a fraction of the overall report and was not the main focus of the report.

On 29 October 2014, there had been an interception of a civilian Latvian Russian-made cargo plane and also there had been reports of two Russian aircrafts being intercepted by the RAF. Channel 4 said that the producer and presenter believed the audio clip related to an intervention of a Russian aircraft; further in mitigation, the report had been removed from the website and when reinstated the audio extract had been deleted, whilst a notice stated the original report wrongfully depicted the aircraft as a Russian controlled plane. Also, ITN had amended its internal system for archiving reports.

Ofcom took account of Channel 4 News representations and said that, when applying Rule 5.1 of the Code, due accuracy meant adequate or appropriate to the subject matter. It was vital viewers could trust news broadcasts as being accurate.

Whilst the clip did not give specific details of date and time of the incident, the purpose of the recording was to depict a recent intervention of a Russian military aircraft and as such it was misleading to viewers by showing a Latvian civilian aircraft. The broadcast was some three weeks after the incident and this gave Channel 4 sufficient time to ensure due accuracy in their reporting. Ofcom were also concerned that this complaint arose shortly after another breach of rule 5.1 by Channel 4 News concerning a lapse of impartiality towards London’s Metropolitan Police when reporting on the Ellison Report about race relations (see IRIS 2015-5/16).

• Ofcom Broadcast Bulletin, “Channel 4 News”, Issue 277, 20 April 2015, 5-9
<http://merlin.obs.coe.int/redirect.php?id=17602>

EN

Julian Wilkins
Blue Pencil Set

Gulati v. MGN Ltd: High Court awards damages in phone-hacking cases

The cases concerned claims based on infringements of privacy rights as a result of the unauthorised access by one person of another’s voicemail/answering machine (phone hacking). The defendant was the proprietor of three newspapers - the Daily Mirror, the Sunday Mirror and The People. The claimants were eight persons in the public eye, such as actors, sportsmen or people with an association with such people. The claimants argued that journalists listened to messages left on the claimants’ respective voicemail services and also listened to the voicemail messages left by the claimants on the phones of others. The journalists thereby became privy to private information about the personal affairs of the claimants and were able to write stories and publish photographs that the newspapers would not otherwise have been able to use.

As far as liability was conceded, the cases concerned the assessment of damages. There were two main points of disagreement between the parties. First, although liability in respect of certain instances of phone hacking and certain stories were admitted, the scale of the phone hacking was not. This is important because the infringements of privacy to be compensated were not limited to those which resulted in published articles. Secondly, there was disagreement as to the sorts of injury for which compensation can and should be paid.

Looking at this point first, the defendant argued that damages should relate to “distress or injury to feeling” (paragraph 108), which if accepted would have limited the amount payable. By contrast the claimants argued there were threefold aspects to the damage: (a) loss of privacy or autonomy from the hacking that went on; (b) injury to feelings/distress; and (c) injury to dignity or standing (paragraph 108).

Referring to *Campbell v. MGN* [2004] 2 AC 457, the judge accepted that the interests protected are not limited to distress or injury to feelings and to hold so would make the rights protected to a large degree illusory. While the court noted that the precedent set by *R (Lumba) v. Secretary of State for the Home Department* [2012] 1 AC 245 meant that there should be no vindictory damages, that case did not rule out “compensation for the act of misuse itself” (paragraph 132). In reaching this conclusion, the court argued the following: “the defendant will have helped itself, over an extended period of time, to large amounts of personal and private information and treated it as its own to deal with as it thought fit. There is an infringement of a right which is sustained and serious” (paragraph 132).

The parties disagreed as to whether damages should be calculated as an overall sum or in relation to each incident. The judge opted for the latter approach, but commented that the overall sum should be proportionate (paragraph 157).

Finally, as regards quantum, the court looked to comparator cases from *Cornelius v De Taranto* [2001] EMLR 329 to *Weller v Associated Newspapers* ([2014] EMLR 24) and drew three broad points from them: (a) an increasing tendency to appreciate and give effect to the seriousness of invasions of privacy; (b) the judges in these cases did not seek guidance from other areas of law, such as libel (or harassment claims); and (c) all involved much smaller amounts of damages, even in cases which were expressed to be very serious cases.

The scale of the invasion of privacy by the phone hacking was very much greater than in any of the previous cases. It took place on a daily basis, resulting in many articles which, although they may have had a commonality of type of subject matter, did not equate to a single story repeated in several articles over a period. Phone hacking also included invasions of privacy on a grand scale which did not result in any

form of publication. The scale of the hacking seems to have had an impact on the level of damages, as did the deliberate attempts to hide that it had been taking place. The judge awarded sums ranging from £85 000 to £260 250. The previous highest damages amount was £60 000, awarded to Max Mosley (see *IRIS* 2011-7/1). Other previous high profile examples include *Campbell*, awarded £4 000 for being photographed after drug therapy sessions and the publication of the wedding photographs of Douglas/Zeta-Jones in *Hello!*, which resulted in an award of £3 750. The awards here seem more akin to sums awarded in defamation actions. The judgment will be a guide to the award of damages in other pending phone hacking cases, as well as any other future similar actions. Whether the comparative generosity of the court is felt elsewhere in privacy and data protection cases absent this degree of wrong-doing remains to be seen.

• *Gulati & Ors v MGN Limited* [2015] EWHC 1482 (Ch)
<http://merlin.obs.coe.int/redirect.php?id=17601>

EN

Lorna Woods

School of Law, University of Essex

New guidelines on restrictions on reporting proceedings in criminal courts

A new set of guidelines on open justice and reporting restrictions in the criminal courts has been published by the Lord Chief Justice, the News Media Association (NMA), the Society of Editors and the Media Lawyers Association, who were all involved in their preparation. The new guidelines take account of recent changes relating to anonymity for those under 18 and in cases concerned with female genital mutilation.

The basic principle is that of open justice, requiring that proceedings must be held in public, evidence must be communicated publicly and fair, accurate and contemporaneous media reporting of proceedings should not be prevented unless strictly necessary. Thus, the court should not exclude the press or public from proceedings, permit evidence to be given elsewhere than in the public proceedings or order restrictions on the reporting of proceedings.

This principle is subject to a number of exceptions which apply in special circumstances. The first is that proceedings may be held in private where the hearing of the case in public would frustrate or render impractical the administration of justice. Examples would be where evidence would damage the interests of national security or where evidence is being given by witnesses under 18. Youth Court proceedings are not normally public, although there are exceptions for representatives of the press.

There are also a number of automatic restrictions on the freedom to report criminal proceedings. The Contempt of Court Act 1981 prohibits the publication of anything which creates a substantial risk that the course of justice in the proceedings in question will be seriously impeded or prejudiced, even if there is no intent to cause such prejudice. There are defences for fair and accurate reports of proceedings held in public, for discussions in good faith of public affairs or matters of general public interest where the risk is merely incidental to the discussion and for publishers and distributors who did not know nor have reasonable grounds to know of the proceedings or the risk. Other rules include a lifetime ban on the publication of the identity of victims of sexual offences or of female genital mutilation or the identity of those involved in youth court proceedings and reports of some types of preliminary hearings are prohibited.

Discretionary restrictions require the court to balance the need for the restriction against the importance of freedom of expression and to hear representations from the press before making the restrictions. They include the power to impose restrictions on the publishing of the identity of participants in proceedings who are under 18 and to prevent the publication of the identity of adult witnesses during their lifetime where publication would impede their cooperation or the quality of the evidence due to their fear or distress. Reporting of proceedings may also be postponed to avoid a substantial risk of prejudice to the administration of justice.

• Judicial College: Reporting Restrictions in the Criminal Courts, April 2015

<http://merlin.obs.coe.int/redirect.php?id=17634>

EN

Tony Prosser

University of Bristol Law School

IE-Ireland

High Court grants injunction preventing broadcast of businessman's banking details

On 21 May 2015, a High Court judge granted an injunction preventing the public broadcaster RTÉ from broadcasting confidential banking information concerning an Irish businessman. The judge announced that he would publish a "redacted" judgment at a later date and ruled that some of his conclusions could not be reported by the media until lawyers agreed on which parts of the judgment should be redacted. The 48-page redacted judgment was published on 3 June 2015.

But, on 29 May 2015 and before the redacted judgment was published, a Member of Parliament disclosed some of the confidential banking information

concerning the businessman in the lower house of parliament (Dáil Éireann) under parliamentary privilege. Some Irish media organisations (including RTÉ) decided not to report the MP's statements, due to uncertainty over whether doing so might breach the High Court's injunction. RTÉ and The Irish Times newspaper applied to the court to seek confirmation they could report the MP's statements. On 2 June 2015, in an unpublished ruling, the High Court judge confirmed he "never intended to, nor could he", restrain MPs from making statements in Parliament or to restrict the fair and accurate reporting of such statements by the press.

On 3 June 2015, the judge published his redacted judgment, taking account of the information already disclosed by the MP. Setting out the background, the Court noted that, in April 2015, RTÉ had written to the businessman Denis O'Brien and the nationalised bank IBRC informing them that RTÉ intended to broadcast a news report which included confidential banking information concerning O'Brien and the bank and asking for comment. The businessman's lawyers wrote to RTÉ requesting that the broadcaster not publish any confidential information and, when RTÉ refused, O'Brien and the bank applied to the High Court seeking an injunction.

RTÉ argued that the businessman was a "public figure" who was a "very major debtor" to the nationalised bank and there was a "public interest" in "the manner in which IBRC, both before and after its liquidation has dealt with substantial debtors". Its broadcast would divulge certain confidential information concerning O'Brien and the bank, including "the original amount of his indebtedness to IBRC, the amount repaid by him as of October, 2013, and his request for an extension of the period of repayment of the balance due". In particular, RTÉ argued that a request for a loan extension "may not have properly processed within IBRC in so far as Mr. O'Brien alleged that he had a verbal agreement with the then CEO in relation to the duration of an extension of the period for repayment of the balance of his loan, in circumstances where any such agreement was reached without credit committee approval".

On the other hand, O'Brien argued that he would "suffer irreparable harm both personally and financially" if the information was disclosed and a banking expert submitted an affidavit to the Court that the disclosure "is likely to be sufficient to damage Mr. O'Brien's relationship with his bankers and impact on the terms of credit available to Mr. O'Brien".

First, the Court noted that the businessman was of "national and international renown" and "undoubted status as a public figure". The Court then reviewed the case law on injunctions and the press and held that the proper test should be the "convincing case" test, namely, that it is necessary "to demonstrate, by proper evidence, a convincing case to bring about a curtailment of the freedom of expression of the

press". The Court said that the businessman's entitlement to privacy in the documentation both under Article 8 of the European Convention and the Irish constitution had to be balanced against the broadcaster's right to freedom of expression under Article 10 of the European Convention on Human Rights and the Irish constitution. But, in conducting this balancing exercise, the Court held that "the Court must take account of the fact that very little, if any, connection has at this stage been established between the public interest in alleged failures of corporate governance at IBRC and O'Brien's personal dealings with IBRC." In the "absence of such a connection", the Court ruled that the plaintiffs had "established a convincing case" that they will succeed at trial. The Court concluded that the "balance of convenience" favours the plaintiffs as, if injunction was not granted, "significant details of the private banking affairs" of the businessman would be placed in the public domain and would cause him "incalculable loss".

- O'Brien v RTÉ [2015] IEHC (21 May 2015)
<http://merlin.obs.coe.int/redirect.php?id=17635> EN
- RTÉ, "Denis O'Brien granted injunctions against RTÉ", 21 May 2015
<http://merlin.obs.coe.int/redirect.php?id=17603> EN
- RTÉ, Catherine Murphy outlines details of IBRC-O'Brien business relationship in Dáil", 29 May 2014
<http://merlin.obs.coe.int/redirect.php?id=17604> EN
- RTÉ, "Judge says he did not intend to restrict Dáil reporting", 2 June 2015
<http://merlin.obs.coe.int/redirect.php?id=17605> EN

Ronan Ó Fathaigh

Institute for Information Law (IVI), University of Amsterdam

IT-Italy

AGCOM proceeding aimed at ascertaining dominant positions in the sector of audiovisual media services

On 12 May 2015, the Italian Communications Authority (Autorità per le garanzie nelle comunicazioni - AGCOM) approved Resolution no. 286/15/CONS starting the proceeding aimed at identifying the relevant market(s), as well as ascertaining dominant positions or positions that otherwise affect pluralism in the sector of audiovisual media services.

According to Article 43, paragraph 2 of Legislative Decree no. 177 of 31 July 2005, upon reporting on an interested topic or on its own periodical initiative, AGCOM: (i) identifies the relevant market in compliance with the principles set forth under Articles 15 and 16 of Directive 2002/21/EC of the European Parliament and Council, and (ii) ascertains the presence in the

integrated communications system of dominant positions, as well as the respect of the limits provided by paragraphs 7, 8, 9, 10, 11 and 12 of the same Article 43.

In its assessment, AGCOM takes into account the level of competition of the system, the barriers to entry the market, the dimensions which would improve the economic efficiency of the company and the quantitative index of diffusion of broadcasting programmes, editorial products and cinematographic and photographic works.

On 28 October 2010, by Resolution no. 555/10/CONS, AGCOM identified in the context of the so-called integrated communications system the following relevant markets: the free TV market, the pay-TV market, the radio market, the newspaper market and the magazine market. However, AGCOM did not carry out an assessment of the presence of dominant positions in such markets.

Given the profound changes that the sector of the audiovisual media services has been subject to during the last years, by means of the proceedings at hand, AGCOM's objective is to carry out a new analysis aimed at identifying the relevant market(s) in such sectors. Therefore, the scope of AGCOM's analysis will be narrower than the scope of the 2010 analysis, because AGCOM will focus on audiovisual media services only and not also on other sectors belonging to the integrated communications system (for example, this time the press will be out of the scope).

In addition, AGCOM will assess whether there are dominant positions or positions that otherwise affect pluralism in the relevant market and finally, if this is the case, will adopt the measures provided under Article 43, paragraph 5, of Legislative Decree no. 177/2005.

The proceeding will terminate after 180 days from the publication of the Resolution on AGCOM's website (the publication occurred on 8 June 2015) and may be extended for an additional period of 90 days.

- *Delibera n. 286/15/CONS, Avvio del procedimento volto all'individuazione del mercato rilevante nonché all'accertamento di posizioni dominanti o comunque lesive del pluralismo nel settore dei servizi di media audiovisivi, ai sensi dell'art. 43, comma 2, del decreto legislativo 31 luglio 2005, n. 177* (Resolution no. 286/15/CONS, Start of the proceeding aimed at identifying the relevant market, as well as ascertaining dominant positions or positions that otherwise affect pluralism in the sector of audiovisual media services, as provided under Article 43, paragraph 2 of Legislative Decree no. 177 of 31 July 2005)

<http://merlin.obs.coe.int/redirect.php?id=17606>

IT

Ernesto Apa and Daniel Giuliano
Portolano Cavallo Studio Legale

NL-Netherlands

Court applies Google Spain again: no right to be forgotten for convicted criminals

On 1 May 2015, the North Netherlands District Court ruled in a case regarding the request to have certain search results pertaining to the plaintiff's criminal history delisted from Google Search based on search queries limited to his name. This is another judgment in a series of Dutch cases concerning the application of the CJEU's Google Spain judgment (see for a recent example IRIS 2015-5/25).

The plaintiff was convicted for killing his wife, the mother of his children, in 2007. He was sentenced to 12 years in prison and treatment under a hospital order (terbeschikkingstelling - TBS). Among the defendants are three associations that have the aim of representing the interests and position of surviving relatives of victims of violent crimes. The associations have jointly founded a "Federation of Surviving Relatives of Violent Crimes". The main defendant is the victim's father, who has worked closely with the Federation.

In December 2014, the criminal had already been released from prison and the District Court of Rotterdam decided to end the treatment under a hospital order on certain conditions. However, Google search queries of his name still gave search results that pertained to the murder and the subsequent criminal sanctions. The plaintiff filed a request with Google to delist these results in searches for his name, which Google honoured.

The plaintiff's request was published online. The Federation posted the application on its website, along with a letter from the victim's father and the criminal sentence from 2007, rendering the earlier Google Spain request ineffective. The plaintiff thus demanded that the Federation remove the publication from its website and that it refrain from publishing anything that contains personal data relating to the plaintiff in the future. He claimed that the publication hinders his return to society and his search for new employment. The defendants maintained that freedom of speech also covers the right for society to stay informed about violent crimes and the person who committed them and that surviving relatives have the right to remember their victim family members.

The District Court assessed the case on the basis of national data protection law (Wet bescherming persoonsgegevens) and the CJEU's Google Spain decision. A balance had to be struck between the freedom of speech of the defendants on the one hand and the privacy and data protection rights of the plaintiff on the other.

In applying the criteria, the court noted that committing a serious crime inevitably results in a lot of (negative) publicity for the convicted criminal and that, together with the criminal conviction itself, will remain relevant information about that person. Relevant circumstances in this case were the following: the crime was committed less than ten years ago, the conditions regarding the treatment under a hospital order still apply and the plaintiff has not shown any remorse or recognition of the fact that he is indebted to society and the surviving relatives specifically. Further, the court considers that freedom of speech may only be restricted in rare circumstances and the public has a right to information regarding violent crimes. The rights of the relatives in this case outweigh the right to protection of the plaintiff's privacy. Consequently, the court rejected the removal claim.

• *Rechtbank Noord-Nederland, 1 mei 2015, [A] tegen de Vereniging voor Veiligheid, Respect en Solidariteit (VVRS), Vereniging Ouders van een Vermoord Kind, de Stichting 'Aandacht Doet Spreken' e.a., ECLI:NL:RBNNE:2015:2122* (North Netherlands District Court, 1 May 2015, [A] v. Vereniging voor Veiligheid, Respect en Solidariteit (VVRS) (Association for Safety, Respect and Solidarity), Vereniging Ouders van een Vermoord Kind (Association for Parents of murdered children) of the Stichting 'Aandacht Doet Spreken' (Foundation for victim support, loosely translated as 'Attention gives a voice'), ECLI:NL:RBNNE:2015:2122)

<http://merlin.obs.coe.int/redirect.php?id=17607>

NL

Rachel Wouda

Institute for Information Law (IViR), University of Amsterdam

Court of Appeal overturns judgment against broadcaster for criticising telecom provider

In its judgment of 24 April 2015, the Dutch Court of Appeal of Amsterdam refused to declare an item about a telecom provider a tortious act, even though it was in bad taste. A Dutch broadcasting organisation called BNN-VARA, the appellant in this case, broadcast a show in which it devoted attention to various complaints about the telecom provider Pretium, the respondent. The show started with an item that told the story of an old lady who had been unable to use her telephone line in the final weeks of her life, because of a failure of her telephone company. Sober music and shots of one of the old lady's family members who was visiting her grave accompanied the story. The court of first instance agreed with the telecom provider that this particular item was unlawful and that the broadcaster had to pay damages. Subsequently, the broadcaster filed an appeal.

The broadcaster's right to freedom of expression was in conflict with the telecom provider's right not to be subjected to publications that, due to unfounded or light-hearted allegations therein, would violate its right to respect for its honour and good name. Such a publication would be a tortious act within the meaning of Article 6:162 of the Dutch Civil Code. The Court

considered that the question which of those rights outweighed the other depended on the facts of the case and on the Supreme Court's judgment of 24 June 1983 (Gemeenteraadslid). In that regard, the Court found significant the press' task to impart information of public interest and its task to act like a public watchdog. Furthermore, the Court attached importance to the right of the public to receive information.

In contrast to the court of first instance, the Court of Appeal concluded that the broadcast was not unlawful. Correspondence between the telecom provider and the old lady proved that the former had not disposed of its duties toward the latter in securing a working telephone line. Therefore, the fault-finding reporting was sufficiently supported by the facts of the case. The Court added that the fact the item was in bad taste did not change its conclusion. It rejected all of the telecom provider's claims.

• *Hof Amsterdam 24 april 2015, ECLI:NL:GHAMS:2015:1515 (Omroepvereniging BNN-VARA/PRETIUM B.V.)* (Court of Appeal of Amsterdam, 24 April 2015, ECLI:NL:GHAMS:2015:1515 (Omroepvereniging BNN-VARA/PRETIUM B.V.))
<http://merlin.obs.coe.int/redirect.php?id=17608>

NL

Sarah Johanna Eskens

Institute for Information Law (IViR), University of Amsterdam

Court of Appeal allows broadcast of video footage acquired in spite of film ban

In its judgment of 28 April 2015, the Dutch Court of Appeal of Amsterdam rejected a claim to prevent the broadcast of video footage that was acquired in spite of a film ban. The appellants (a producer and the broadcasting organisation KRO-NCRV) wanted to test whether someone dressed in a uniform-like outfit would be able to act like an employee of a given company. They filmed such an experiment in the retail store of the respondent with a hidden camera and a hand-held camera. In a judgment on preliminary relief proceedings, the court of first instance prevented the appellants from broadcasting the footage. The appellants filed an appeal.

The appellants' right to freedom of expression clashed with the respondent's right to protect the privacy of its employees and visitors to its store. The Court stated that, first and foremost, the respondent was entitled to determine the company rules its visitors had to comply with. It was undisputed that the respondent had made its film ban known. The video footage was shot without the consent of the respondent and therefore possibly constituted an infringement of its property or user rights. However, the Court found that that did not mean an injunction to broadcast the footage was automatically justified, since such a rule would amount to preventive censorship. Furthermore, the

Court concluded from the European Court of Human Rights (ECtHR) judgment in *Mosley v. the United Kingdom* (see IRIS 2011-7/1) that the ECtHR deemed it important that, bearing in mind the weight attached to the right to freedom of expression, the assessment of any possible wrongfulness of a publication or broadcast would take place after the item had been shown to the public.

In contrast to the court of first instance, the Court of Appeal determined that the facts of the case did not justify derogation from what was set out above. The Court considered that the appellants had stated they did not intend to show the respondent in a bad light. They only wished to make an entertainment programme in which they could test new television formats and create interaction with the public. The Court also attached importance to the fact that the appellants had promised not to show the hidden camera footage. In addition, the Court considered that, for the time being, there was no indication of reputational damage for the respondent or its visitors. Finally, the Court found it unlikely that if the respondent would bring an action on the merits after the footage had been shown to the public and the broadcast would be considered unlawful, the adverse effects for the respondent could not be recovered.

The Court concluded that imposing a prohibition prior to the broadcast of the footage was not justified.

• *Hof Amsterdam 28 april 2015, 200.157.976/01 (CCCP en KRO-NCRV/Media Markt)* (Court of Appeal of Amsterdam, 28 April 2015, 200.157.976/01 (CCCP and KRO-NCRV/Media Markt))
<http://merlin.obs.coe.int/redirect.php?id=17609>

NL

Sarah Johanna Eskens

Institute for Information Law (IViR), University of Amsterdam

Monitoring of digital television consumption infringes Dutch data protection law

On 9 June 2015, the Dutch data protection authority (College bescherming persoonsgegevens - CBP) announced that Ziggo, which is one of the biggest providers of digital television in the Netherlands, had ended its privacy infringing activities. An investigation, prior to the announcement, had concluded that Ziggo had infringed Dutch Data protection law on several occasions.

According to the investigation by the CBP, Ziggo collected and used personal data of subscribers, without correctly informing the data-subjects. Furthermore, the investigation concluded that Ziggo did not obtain the requisite unambiguous consent for the processing of the personal data.

Notably the CBP made a remark regarding the nature of the personal data involved in Ziggo's data process-

ing activities. According to the CBP, the monitoring of digital television consumption intrusively reveals the habits and interests of subscribers and, therefore, the personal data gathered from this processing activity has to be deemed to be of a sensitive nature.

Ziggo's unlawful activities consisted of the monitoring of the viewing habits of subscribers in order to analyse viewing ratings without informing them. Consequently, Ziggo did not obtain the requisite consent for the collection and use of persona data following from the Dutch data protection act (Wet bescherming persoonsgegevens - DDA). Moreover, Ziggo monitored the use of its video-on-demand service in order to target subscribers with personally tailored content, without obtaining their consent. Lastly, the CBP concluded that Ziggo unlawfully used personal data, collected by monitoring the digital consumption of its subscribers, for direct marketing purposes.

The CBP states that Ziggo now complies with the requirements of the DDA by correctly informing subscribers and requesting their unambiguous consent for their data processing activities. Furthermore, Ziggo implemented anonymisation methods by which the subscriber's consumption habits cannot be traced back to an individual user.

• *College bescherming persoonsgegevens, "Ziggo beëindigt privacy-overtredingen digitale tv na onderzoek CBP", 9 juni 2015* (Data Protection Authority, "Ziggo ends privacy violations in digital TV after CBP examination", 9 June 2015)
<http://merlin.obs.coe.int/redirect.php?id=17626>

NL

Youssef Fouad

Institute for Information Law (IViR), University of Amsterdam

LT-Lithuania

The Lithuanian Film Foundation

This year, the Lithuanian Audiovisual Authors and Producers Rights Association "AVAKA" has implemented a project named "The Lithuanian Film Foundation". The programme was partially financed by the Lithuanian Ministry of Culture. The remunerations collected for the reproduction of audiovisual works (copying) for private use (applied universal levies on hardware, storage medium etc.), which was introduced in 2012 (see IRIS 2012-4/32), provided 25 percent of the funding.

The essence of this project was a release of a mobile application allowing viewers to watch films from the Lithuanian film heritage on their tablets and/or smartphones. Currently, the database contains a collection of over one hundred classic Lithuanian films created

between 1957 and 1981 by more than 108 film directors. All these films were created in the Lithuanian Film Studios. The application is accessible both on Android and iOS devices by means of an application called "KINO FONDAS". All available films may be streamed free of charge, while downloading is not allowed.

The programme aims to attract film classics, as well as newer Lithuanian films. New Lithuanian filmmakers are welcome to make their films available on this application. The goal is to develop the application into a platform where Lithuanian filmmakers could present their audiovisual works. The project will allow film classics to remain well known and accessible to different audiences.

• *Apie projektą "Kino fondas"* (Information about the Lithuanian Film Foundation)
<http://merlin.obs.coe.int/redirect.php?id=17610>

LT

Laurynas Ramuckis
Sorainen

RO-Romania

Regulations on the status of orphan works

On 3 June 2015, the Romanian Government adopted a Draft Law for the completion of the Law no. 8/1996 on copyright and related rights (Legea nr. 8/1996 privind dreptul de autor și drepturile conexe). The document is the response of the Government to the infringement procedure against Romania triggered by the European Commission on 27 May 2015 (see IRIS 2006-8/27 and IRIS 2015-5/30). The European Commission launched the infringement procedure against Romania and five other EU countries after setting in a reasoned opinion a term of two months to communicate the transposition of the Directive 2012/28/CE on orphan works into national legislation. The term for the transposition was 29 October 2014.

The Draft Law transposes the Directive 2012/28/CE on certain permitted uses of orphan works into national legislation. The act aims to facilitate the digitisation and dissemination of works and other objects protected by copyright or related rights for which the copyright holder could not be identified or located. Before a work or phonogram is to be considered "orphan", a diligent search for the rightholders has to be carried out in good faith. The diligent search is done by consulting the appropriate sources for each category of works and protected objects and it must be carried out prior to their use. If the copyright holder is subsequently identified or located, that work or phonogram does not retain "orphan" status any longer. Not covered by the regulation are anonymous

and pseudonymous works, which do not belong in the category of orphan works.

According to the Draft Law adopted by the Romanian Government, the orphan work status applies to several categories of works and phonograms protected by copyright or related rights that have been published or broadcast for the first time in an EU Member State: books, journals, newspapers, magazines or other writings and cinematographic and audiovisual works and phonograms that are in the collections of libraries, educational establishments or museums accessible to the public, as well as the archives or collections of film heritage institutions, as well as cinematographic and audiovisual works and phonograms produced by public broadcasters until 31 December 2002 which are in their archives. If a work or phonogram is considered an orphan work in another EU Member State, it is also considered an orphan work in Romania and can be used and accessed in accordance with the Draft Law.

Libraries, educational establishments and museums accessible to the public, archives, film heritage institutions and radio and television public service broadcasting institutions can use orphan works by making them available to the public and by reproducing them for the purpose of digitisation, making available, indexing, cataloging, preserving and restoring.

The institutions mentioned above can use an orphan work only in order to achieve the goals of their public interest missions, notably the preservation of the works and phonograms of their collections and providing access for cultural and educational purposes. These bodies may obtain income from the use of orphan works exclusively for covering the costs of digitisation and their release to the public.

The stipulations of the Draft Law shall not prejudice the provisions on patents, trademarks, industrial designs, utility models, topographies of semiconductor products, type faces, conditional access, the access of radio and TV services to cable broadcasting, the protection of national treasures, legal deposit requirements, restrictive practices and unfair competition, trade secrets, security, confidentiality, data protection and privacy, access to public documents, the law of contract, freedom of the press and freedom of expression of mass-media.

In the absence of these new provisions, the digitisation, reproduction and making available to the public of orphan works would not have been possible, since the exclusive rights of copyright holders in terms of reproduction and making available to the public imply prior agreement of their authors.

• *Reglementări privind statutul "operelor orfane"* - Guvernul României comunicat de presă 03.06.2015 (Regulations on the status of "orphan works", Press release, Romanian Government, 3 June 2015)

<http://merlin.obs.coe.int/redirect.php?id=17611>

RO

• *CE declanșează două proceduri de infringement pentru România una în domeniul bancar și celalaltă pe legislația drepturilor de autor, Euractiv 28.05.2015* (The EC triggers two infringement procedures against Romania: one in the banking field and the other on the copyright legislation, Euractiv 28 May 2015)

<http://merlin.obs.coe.int/redirect.php?id=17612>

RO

Eugen Cojocariu
Radio Romania International

New digital terrestrial television multiplexes granted

Five new regional and local multiplexes in Suceava, Botosani, Bacau, Buzau and Piatra Neamt (the northern and eastern parts of Romania) have been awarded in the third auction held by the National Authority for Management and Regulation in Communications (Autoritatea Națională pentru Administrare și Reglementare în Comunicații - ANCOM) for Digital Terrestrial Television (DTT) multiplexes (see IRIS 2010-3/34, IRIS 2010-7/32, IRIS 2010-9/35, IRIS 2011-4/33, IRIS 2013-6/30, IRIS 2014-4/26, IRIS 2014-5/29, IRIS 2014-9/27 and IRIS 2015-5/33). A regional multiplex will cover the whole county with digital terrestrial television services, whereas a local multiplex will serve specific assignment areas, which may correspond to one locality. All the multiplexes will be awarded for a 10-year period.

Following the initial bids, the company Info Total Press S.A. acquired three multiplexes (two regional ones in Suceava and Botosani and a local one in Bacau), for which it will pay EUR 18 200, representing the total licence fee. TV Sat 2002 won 1 regional multiplex in Buzau, for which it will pay EUR 8 000. The multiplex in Piatra Neamt was awarded, following a record number of 42 primary rounds, which took place between 18 - 26 May 2015, to Grup Est Security S.R.L., while the licence fee to be paid amounts to EUR 41 600. The licence fees, amounting to a total of EUR 67 800 are to be paid to the state budget within ninety calendar days from the announcement of the results.

This was the third auction organised by ANCOM for awarding DTT multiplexes. The first DTT auction was completed in June 2014, when three national multiplexes were awarded to the state owned National Broadcasting Company (Societatea Națională de Radiocomunicații S.A - SNR). The company won the free-to-air multiplex and two other multiplexes in the UHF band for a licence fee of EUR 1 020 002. Nine regional DTT multiplexes were awarded following an auction completed in February 2015. The winners were Regal, which was awarded one regional multiplex (Ramnicu Valcea in the southern half of Romania) for EUR 8 010, Cargo Sped, which was awarded one regional multiplex (Sibiu in the centre) for EUR 8 001, 2K Telecom, which was awarded five regional multiplexes (four in

Bucharest and one in Ploiesti in the south) for a licence fee of EUR 52 000, Radio M Plus, which obtained one regional multiplex (Iasi in the north-east) for EUR 10 000 and Digital Video Broadcast, which won one regional multiplex (Satu Mare in the north-west) for EUR 8 000.

In the meantime, at the end of April 2015, the National Audiovisual Council (Consiliul Național al Audiovizualului - CNA) endorsed a Draft Law which provides that the analogue terrestrial broadcasting of public and commercial TV stations can continue temporarily until 31 December 2016. The Draft Law was introduced in view of the fact that analogue broadcasting in Romania must be stopped on 17 June 2015, according to the National Strategy approved by the Romanian Government with Government Decision no. 403/2013.

• The ANCOM press release of 27 February 2015
<http://merlin.obs.coe.int/redirect.php?id=17613>

EN

• CNA a avizat favorabil un proiect de lege care permite transmiterea analogică terestră până în 2016, Agenția Mediafax, 28/04/2015 (CNA has endorsed a Draft Law which allows the terrestrial analogue broadcasting until 2016, Agenția Mediafax, 28 April 2015)
<http://merlin.obs.coe.int/redirect.php?id=17614>

RO

Eugen Cojocariu
Radio Romania International

RS-Serbia

Digital switch over completed

The Republic of Serbia has signed and ratified the Agreement for Digital Broadcasting (GE06) and the Regional Radiocommunication Conference (RRC 06), which prescribed an obligation of digital transition for television for European countries by 17 June 2015. The switch-over from analogue to digital terrestrial television in the country was officially completed on 7 June 2015, just ten days before the deadline.

The National Broadcasting Agency "Broadcasting Technology and Links" (Emisiona Tehnika i Veze - ETV) founded by the Government of the Republic of Serbia in the year 2009 is responsible for the technical aspects of the digital transition, as it is the exclusive operator of digital terrestrial networks and multiplexes. The regulatory framework for the Digital Switch-Over (DSO) consisted of the Strategy for the Transition from Analogue to Digital Signal in the Republic of Serbia (adopted in 2009 and amended in 2012 and 2013), the Law on Electronic Communications (adopted in 2010 and amended in 2014), the Law on Electronic Media (adopted in 2014) and the Rulebook on the DSO (adopted in 2010 and amended several times). Originally, the DSO was planned to be completed by 4 April

2012, in accordance with EU policy in the area. However, this plan proved to be too ambitious due to the lack of vacant frequencies for the purpose of testing the digital signal.

In 2012, the amendments to the Strategy completely changed the concept of the DSO by introducing a phased roll-out instead of an one-day switchover process. Other changes that were implemented include the launch of an initial network for testing the digital signal and postponing the final DSO deadline. The main conditions for the DSO that were prescribed in the regulatory framework included the setting-up of the final network and the creation of the user base, i.e. providing an appropriate number of set-top boxes or TV receivers which support a DVB - T 2 signal and MPEG 4 compression standard, as well as the provision of assistance to the socially endangered categories of the population and the launch of a promotional campaign.

The costs of the DSO were initially estimated at EUR 75 million, but the final calculations show that not more than EUR 40 million were spent. The initial network was launched in March 2012. At the very beginning, the network operated from 15 locations covering 15-20% of the population. By 2015, the digital signal was broadcast from 74 locations covering up to 93% of the population.

The Government of the Republic of Serbia adopted a help scheme in 2014. According to that scheme, vouchers were distributed to socially endangered categories of the population enabling them to acquire set-top boxes. In parallel, once there was a sufficient supply of set-top boxes and digital TV receivers in the market, it was concluded that the main prerequisites for the DSO were set in place. The first digital regions were switched off in March 2015, while the final regions were switched off on 7 June 2015. At the moment, 38% of households in Serbia rely on terrestrial signal reception.

Some DSO-related problems were reported in the western parts of Serbia after the switch-off that occurred in early June, but those appear to be solved and the network is, according to official reports, working properly at the moment. The Regulatory Authority for Electronic Media has replaced all the analogue terrestrial television broadcasting licenses with digital ones. All licensed broadcasters will continue to provide services in accordance with the original terms of their licenses and they are all guaranteed a sufficient capacity in the multiplex. The major concern at the moment is the future of the local broadcasters, since their transmission costs will now be higher. ETV granted significant discounts, however these will only be valid until the end of 2016.

• Србија од данас у потпуности
464470463470402460473470467476462460475460, 0461430460462431465475476
7. јуна 2015 (Serbia fully digitalized as of today, press release of
the Ministry of Trade, Tourism and Telecommunications, 7 June 2015)
<http://merlin.obs.coe.int/redirect.php?id=17628>

EN SR

• *Od 7 juna bez analogne televizije u Srbiji* (Press release of the digital network and multiplex operator ETV)

<http://merlin.obs.coe.int/redirect.php?id=17616>

SR

Slobodan Kremenjak

*Attorney at law, Živković Samardžić law office
Belgrade*

UA-Ukraine

Foreign TV severely restricted

The Supreme Rada adopted on 14 May and the President of Ukraine Petro Poroshenko signed into force on 4 June amendments to the 1996 Law on Advertising (see IRIS 1997-1/20) and 2006 Law on Broadcasting (see IRIS 2006-5/34) that affect some foreign broadcasters. The amendments enter into force on 5 August 2015.

The amendments introduce a total ban on commercials in TV programmes of foreign TV and radio entities that broadcast (rebroadcast) in Ukraine unless those entities are under jurisdiction of the states that are members of the EU or parties to the European Convention on Transfrontier Television (ECTT).

They also introduce a requirement that a Ukrainian entity that intends to rebroadcast programmes of foreign entities that are not under the jurisdiction of the states that are members of the EU or parties to the ECTT may start rebroadcasting only if it has a license from the right-holder and only under condition that such programmes (channels) correspond to the laws of Ukraine or to the ECTT and are included in the list of programmes (channels) that are permitted to be retransmitted by a decision of the National Council on Television and Radio Broadcasting (see IRIS 1998-4/14).

• Про внесення змін до деяких законів України щодо особливостей трансляції (ретрансляції) 400465472473460474470, яка міститься у програмах та передачах іноземних телерадіоорганізацій (Law of Ukraine of 14 May 2015, N № 422-VIII on amending some laws of Ukraine as to particularities of transmission (retransmission) of advertising in programmes of foreign TV broadcasters, published on the official website of the Supreme Rada on 5 June 2015)

<http://merlin.obs.coe.int/redirect.php?id=17617>

UK

Andrei Richter

*Faculty of Journalism, Lomonosov Moscow State
University*

Agenda

Westminster Media Forum: EU copyright reform and the digital single market - priorities and challenges

8 September 2015 Organiser: Westminster Forum Projects

Venue: London

<http://www.westminsterforumprojects.co.uk/forums/event.php?eid=1611>

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